network elements to serve a school, library, or healthcare provider.[3113]

1268. We decline to adopt rules regarding section 706 in this proceeding. We intend to address issues related to section 706 in a separate proceeding.

[3113] Illinois Commission comments at 86.

XIII. ADVANCED TELECOMMUNICATIONS CAPABILITIES

1266. Section 706(a) provides that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[3106] In the NPRM, we sought comment on how we can advance Congress's section 706(a) goal within the context of our implementation of sections 251 and 252.[3107]

1267. A number of parties suggest that rules allowing them to compete effectively and earn a profit in the telecommunications industry would assist the industry in providing telecommunications services to all Americans.[3108] MFS suggests that "all LECs should be required, as a condition of eligibility for universal service subsidies, to meet network modernization standards for rural telephone companies."[3109] Several state commissions indicate that they have already established programs to assist institutions eligible under section 706 in deploying advanced telecommunications services.[3110] The Alliance for Public Technology asserts that section 706 should underlie all of the FCC's proceedings.[3111] Ericsson states that the industry should work with government agencies to promote leading edge technology to ensure that it is introduced on a reasonably timely basis. For example, it contends that "Plug and Play Internet use" will greatly help the public and schools access information, and that advanced technology such as asynchronous transfer mode (ATM), wireless data/video, and AIN will enhance interconnection capabilities of public and private networks.[3112] The Illinois Commission contends that, depending on the pricing standard the Commission adopts for interconnection and access to unbundled elements, and the Commission's interpretation of the prohibition against discrimination, the Commission should adopt special rules for carriers when they provide interconnection or access to unbundled

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3106 47 U.S.C. § 706(a).

3107 NPRM at para. 263.

3108 Colorado Ind.Tel. Ass'n comments at 6; COMAV comments at 60-61; GVNW comments at 42; Illinois Ind. Tel. Ass'n comments at 7; Louisiana Commission comments at 24-27.

3109 MFS comments at 88.

3110 Illinois Commission comments at 85; Louisiana Commission comments at 24-27; Texas Commission comments at 36.

3111 Alliance for Public Technology reply at 1-5.

3112 Ericsson comments at 7-8.

the state to make a determination regarding the request. A rural company that falls within section 251(f)(1) is not required to make any showing until it receives a bona fide request for interconnection, services, or network elements. We decline at this time to establish guidelines regarding what constitutes a bona fide request. We also decline in this Report and Order to adopt national rules or guidelines regarding other aspects of section 251(f). For example, we will not rule in this proceeding on the universal service duties of requesting carriers that seek to compete with rural LECs. We may offer guidance on these matters at a later date, if we believe it is necessary and appropriate.

1264. We find that Congress intended section 251(f)(2) only to apply to companies that, at the holding company level, have fewer than two percent of subscriber lines nationwide. This is consistent with the fact that the standard is based on the percent of subscriber lines that a carrier has "*in the aggregate nationwide*."[3104] Moreover, any other interpretation would permit almost any company, including Bell Atlantic, Ameritech, and GTE affiliates, to take advantage of the suspension and modification provisions in section 251(f)(2). Such a conclusion would render the two percent limitation virtually meaningless.

1265. We note that some parties recommend that, in adopting rules pursuant to section 251, the Commission provide different treatment or impose different obligations on smaller or rural carriers.[3105] We conclude that section 251(f) adequately provides for varying treatment for smaller or rural LECs where such variances are justified in particular instances. We conclude that there is no basis in the record for adopting other special rules, or limiting the application of our rules to smaller or rural LECs.

[3104] 47 U.S.C. 251(f)(2) (emphasis added).

[3105] For example, the Rural Tel. Coalition argues that interconnection and collocation points should be set in a flexible manner to take into account size and volume differences among carriers. Rural Tel. Coalition comments at 31.

propose varying interpretations of what constitutes "significant adverse impact on users."[3100] USTA proposes that the definition include any request that would cause a LEC to "have difficulty raising sufficient investment capital, and where the remaining customers . . . would likely bear an increase in rates or a reduction in service to cover a shortfall or subsidy to a new entrant."[3101] TLD proposes that the Commission establish a numerical benchmark, for example, that more than 50 percent of the users would suffer a rate increase of at least 20 percent before a request would be considered in violation of subsection (f)(2)(A)(i).[3102]

3. Discussion

1262. Congress generally intended the requirements in section 251 to apply to carriers across the country, but Congress recognized that in some cases, it might be unfair or inappropriate to apply all of the requirements to smaller or rural telephone companies.[3103] We believe that Congress intended exemption, suspension, or modification of the section 251 requirements to be the exception rather than the rule, and to apply only to the extent, and for the period of time, that policy considerations justify such exemption, suspension, or modification. We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service. Thus, we believe that, in order to justify continued exemption once a bona fide request has been made, or to justify suspension, or modification of the Commission's section 251 requirements, a LEC must offer evidence that application of those requirements would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry. State commissions will need to decide on a case-by-case basis whether such a showing has been made.

1263. Given the pro-competitive focus of the 1996 Act, we find that rural LECs must prove to the state commission that they should continue to be exempt pursuant to section 251(f)(1) from requirements of section 251(c), once a bona-fide request has been made, and that smaller companies must prove to the state commission, pursuant to section 251(f)(2), that a suspension or modification of requirements of sections 251(b) or (c) should be granted. We conclude that it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements. Moreover, the party seeking exemption, suspension, or modification is in control of the relevant information necessary for

[3100] 47 U.S.C. § 251(f)(2)(A)(i).

[3101] USTA comments at 92.

[3102] TLD comments at 11.

[3103] 47 U.S.C. § 251(f).

carriers "and their affiliates."[3092]

1260. Some parties recommend that the Commission offer guidance on how to determine whether a request for exemption, modification, or suspension should be granted.[3093] For example, sections 251(f)(1) and (f)(2) both include consideration of "technical feasibility" in deciding whether to grant an exemption, suspension, or modification. Some parties urge the Commission to clarify whether the standard for determining technical feasibility for purposes of section 251(f) is different than the technical feasibility standard set forth in sections 251(b) and (c).[3094] Sections 251(f)(1) and (f)(2) require the states to consider whether a request is "unduly economically burdensome."[3095] Generally, comments from rural LECs and others contend that smaller LECs cannot afford to hire staff to respond to requests, or expend funds for additional facilities or operational systems without jeopardizing their financial stability.[3096] In contrast, other parties argue that LECs should not be relieved of any duties otherwise imposed by sections 251(b) and (c) merely because they would require the expenditure of funds.[3097]

1261. Some incumbent LECs recommend that carriers that compete with rural LECs should be required to assume some of the universal service obligations of rural carriers.[3098] They argue that, without such safeguards, competing LECs will enter rural markets and take the incumbent LECs' profitable customers. USTA argues that state commissions should be encouraged to grant waivers until universal service issues are resolved.[3099] Commenters also

[3092] PacTel reply at 40-41.

[3093] *See, e.g.*, NCTA comments at 63-67 (urging a very limited construction of the exemption, suspension and modification provisions); *contra* Western Alliance reply at 7; Rural Tel. Coalition reply at 21-22.

[3094] *See, e.g.*, Bay Springs, *et al.* comments at 11; Lincoln Tel. comments at 23-24; SNET comments at 35; USTA comments at 92; Rural Tel. Coalition reply at 22-23.

[3095] 47 U.S.C. § 251(f).

[3096] A number of parties argue that, if smaller and rural LECs cannot recover their total costs, including any required investments and costs associated with developing rate levels and modifying support systems, the request should be deemed unduly economically burdensome. *See, e.g.*, USTA comments at 92; SNET comments at 36; TLD comments at 2; Lincoln Tel. comments at 23-25; TLD comments at 11-13.

[3097] *See, e.g.*, NCTA comments at 64 n.218.

[3098] Bay Springs, *et al.* comments at 12; TLD comments at 5; *accord* NECA comments at 11.

[3099] USTA comments at 91; *but see* NCTA reply at 25-26.

should be considered a bona fide request.[3084]

1258. Other commenters either favor a broader definition of a bona fide request or oppose federal standards entirely.[3085] NCTA and GCI argue that a request for interconnection should be presumed bona fide until a rural telephone company shows that it is not. They object to a bona fide request requirement, such as the one proposed by USTA, that includes burdensome "pre-filing" requirements as a condition for state review under section 251(f).[3086]

1259. Subsection 251(f)(2) applies to LECs "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide."[3087] Several parties suggest that the Commission clarify which carriers meet the numerical standard.[3088] AT&T and a number of other parties argue that the 2 percent should be applied at the holding company level in order to ensure that no BOC operating company can apply for a suspension or modification under this subsection.[3089] Some parties further question whether Tier 1 LECs should be allowed to petition for suspension or modification under subsection (f)(2).[3090] Other parties argue that the two percent statutory cut-off is not a loophole and that the statutory standard should not be altered by the Commission to exclude Tier 1 LECs.[3091] PacTel suggests that the standard should be applied at the operating company level because section 251(f)(2) by its terms applies to "local exchange carrier[s]" not local exchange

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responding to requests); TDS reply at 5-6.

[3084] TDS reply at 5; Anchorage Tel. Utility comments at 6; Rural Tel. Coalition reply at 24-25.

[3085] *See, e.g.*, Louisiana Commission comments at 22-23 (opposing any attempt by the Commission to define a standard for bona fide requests); *see also* Western Alliance comments at 7 n.16.

[3086] NCTA comments at 26-27; GCI reply at 17-18; *but see* USTA reply at 37 (disagreeing that its proposal would constitute "pre-filing" requirements).

[3087] 47 U.S.C. § 251(f)(2).

[3088] BellSouth comments at 76; Ohio Consumers' Counsel comments at 47-48.

[3089] AT&T comments at 90-93; Lincoln Tel. reply at 9-10; GCI reply at 17; TCC reply at 28; Ohio Consumers' Counsel argues that this interpretation is sound because section 251(f)(2) discusses the number of lines "in the aggregate nationwide," and individual operating companies do not operate on a nationwide scale. Ohio Consumers' Counsel reply at 26.

[3090] AT&T comments at 92; TLD comments at 6-7; Centennial Cellular Corp. comments at 12-15.

[3091] Alaska Tel. Ass'n comments at 6; Cincinnati Bell comments at 40, reply at 13; Lincoln Tel. comments at 10-11.

competition will benefit a given rural area.[3078] Bay Springs, *et al.* and Bogue, Kansas argue that rural carriers should benefit from a presumption that they continue to qualify for the exemption in section 251(f)(1).[3079] SNET suggests that, if a LEC makes a *prima facie* case in its petition for suspension or modification, the state should automatically grant a temporary suspension of section 251(b) and (c) obligations, as allowed by section 251(f)(2).[3080]

1257. USTA, some rural LECs, and several other parties advocate that the Commission clarify what constitutes a bona fide request under section 251(f)(1).[3081] USTA recommends that a bona fide request must include, at a minimum: (1) a request for service to begin within one year from the date of the request, with a minimum one-year service period; (2) identification of the points where interconnection is sought, specification of network components and quantities needed, and the date when interconnection is desired; and (3) an indication that the requesting carrier is willing to agree to pay charges sufficient to compensate the LEC for all costs incurred in fulfilling the terms of the interconnection agreement as part of the agreement. USTA also contends that the states should be allowed to mandate longer minimum service periods and require competitive providers to post bonds or submit deposits to ensure that a rural telephone company does not bear the cost of interconnection.[3082] Anchorage Telephone Utility claims that simply responding to requests for interconnection imposes a tremendous burden and expense on rural telephone companies, and that rural LECs should not have to respond to requests that do not meet minimum criteria.[3083] Several parties state that they do not believe that generalized form letter requests

[3078] TCA comments at 10.

[3079] Bay Springs, *et al.* comments at 11; Bogue, Kansas comments at 8; *contra* Classic Tel. reply at 9.

[3080] SNET comments at 37; *see also* Anchorage Tel. Utility comments at 3-4; Cincinnati Bell comments at 41-42; USTA comments at 91-93.

[3081] Anchorage Tel. Utility comments at 5; Bay Springs, *et al.* at 10; Bogue, Kansas comments at 7; NECA comments at 12; TDS reply at 5-6; USTA comments at 87-88; *see also* Kentucky Commission comments at 7.

[3082] USTA comments at 87-88; *accord* Anchorage Tel. Utility comments at 6-7 (carriers that ultimately do not order the items identified in a request for interconnection, services, or network elements should be required to reimburse the incumbent LEC for the costs of responding to such request); Matanuska Tel. Ass'n comments at 5.

[3083] Anchorage Tel. Utility comments at 6 (reporting the receipt of two letters "purporting to request interconnection." "One is a 1-page letter that simply asserts a need for interconnection. The other is an 8-page, single-spaced letter that demands detailed technical, operational and cost information on practically every facet of Anchorage Tel. Utility's local exchange service, without providing any indication of what the requesting carrier actually plans, needs or wants"); *accord* NECA reply at 10-11 (any bona fide request standard should permit LECs to recover costs of responding to requests and enable LECs to avoid unnecessary costs in broad-scale or generalized exemptions, suspensions or modifications.[3070] AT&T argues that, to ensure that states do not allow LECs to avoid the regulatory and policy framework that Congress has mandated, the Commission should clarify that states must narrowly tailor suspensions and modifications to protect against specific, identifiable harm.[3071] Telecommunications Carriers for Competition and GCI argue that section 251(f) allows states to delay imposing the requirements under section 251(b) and (c), but it does not allow states to protect LECs from those requirements indefinitely.[3072] In response, Rural Tel. Coalition and SNET state that, while the term "suspensions" could be interpreted as allowing a time delay in implementation, the addition of the term "modifications" allows states to act more broadly.[3073] SNET favors allowing the states "broad discretion to change the nature of any requirement imposed by subsections (b) and (c)."[3074] USTA argues that states should not be permitted to eliminate all exemptions for all carriers.[3075]

1256. A number of parties allege that the Commission should encourage or require states to establish a legal presumption that the LEC seeking an exemption, suspension, or modification must prove to the state commission that such request is merited under the criteria set forth in section 251(f). AT&T argues that a carrier petitioning for suspension or modification under section 251(f)(2) should be obliged to demonstrate that "the application to it of the [s]ection 251(b) or (c) obligations that are the subject of its petition would inflict substantial harm on the LEC and customers in its territories that would not be inflicted on larger LECs and customers in their territories."[3076] SCBA asserts that the burden should be upon the incumbent LEC, which has strong disincentives to promote competitive entry.[3077] Local exchange carriers contend, on the other hand, that the party making a request under section 251(b) or (c) should have to prove that an exemption, suspension, or modification is not justified. For example, TCA, Inc. argues that, because of the high cost of providing telephone service in rural areas, competing carriers should be required to prove that

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[3070] *See, e.g.*, Centennial Cellular Corp. comments at 16; NCTA comments at 64; Vanguard reply at 21-22.

[3071] AT&T comments at 90-93; *accord* Ohio Consumers' Counsel reply at 26.

[3072] GCI comments at 16-19; TCC comments at 51-53, reply at 28.

[3073] Rural Tel. Coalition reply at 19-20; SNET comments at 36-37.

[3074] SNET comments at 36-37.

[3075] USTA comments at 87; Continental comments at 17 (citing actions of New Hampshire and Connecticut Commissions); Rural Tel. Coalition reply at 25.

[3076] AT&T comments at 92-93; *contra* Cincinnati Bell reply at 14; PacTel reply at 41; SNET reply at 8; USTA reply at 35-36.

[3077] SCBA comments at 17.

intent.[3067] Some commenters favor a middle ground, claiming that non-mandatory guidelines from the Commission would be helpful, but that mandatory requirements would conflict with the Act's delegation to the states to make determinations under section 251(f).[3068]

2. Discussion

1253. We agree with parties, including small incumbent LECs, who argue that determining whether a telephone company is entitled, pursuant to section 251(f), to exemption, suspension, or modification of the requirements of section 251 generally should be left to state commissions.[3069] Requests made pursuant to section 251(f) seek to carve out exceptions to application of the section 251 rules that we are establishing in this proceeding. We find that Congress intended the section 251 requirements, and the Commission's implementing rules thereunder, to apply to all carriers throughout the country, except in the circumstances delineated in the statute. We find convincing assertions that it would be an overwhelming task at this time for the Commission to try to anticipate and establish national rules for determining when our generally-applicable rules should *not* be imposed upon carriers. Therefore, we establish in this Order a very limited set of rules that will assist states in their application of the provisions in section 251(f).

1254. Many parties have proposed varying interpretations of the provisions in section 251(f), and have asked for Commission determination or a statement of agreement. Because it appears that many parties welcome some guidance from the Commission, we briefly set forth our interpretation of certain provisions of section 251(f). Such statements will assist parties and, in particular, state commissions that must make determinations regarding requests for exemption, suspension, and modification.

C. APPLICATION OF SECTION 251(f)

1. Comments

1255. Some commenters urge the Commission to require states to grant exemptions, suspensions, or modifications only on a case-by-case basis, and only to the extent warranted by the particular circumstances. They ask the Commission to prohibit states from granting

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3067 Anchorage Tel.Utility comments at 2-4; Bay Springs, *et al.* comments at 10; Centennial Cellular Corp. comments at 12; Alaska Tel. Ass'n comments at 6; Matanuska Tel. Ass'n comments at 5; USTA comments at 87-93.

3068 Kentucky Commission comments at 7; Anchorage Tel. Utility comments at 4. Several parties argue that any federal action should not be mandatory. Ohio Commission comments at 80; Citizens Utilities comments at 33; Colorado Ind. Tel. Ass'n comments at 6; Rural Tel. Coalition reply at 18-19.

3069 *See, e.g.*, Minnesota Ind. Coalition comments at 14; Rural Tel. Coalition comments at 11.

"consistent with the public interest, convenience, and necessity."[3062] Although we address these two subsections together, we highlight instances in which we believe that differences in statutory language require different treatment by state commissions.

1251. We discuss below issues raised by the commenters, and establish some rules regarding the requirements of section 251(f) that we believe will assist state commissions as they carry out their duties under section 251(f). For the most part, however, we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings. We may in the future initiate a Notice of Proposed Rulemaking on certain additional issues raised by section 251(f) if it appears that further action by the Commission is warranted.

B. NEED FOR NATIONAL RULES

1. *Comments*

1252. Most state commissions[3063] and some other parties[3064] assert that states should have exclusive responsibility for the guidelines and determinations made under this section. Several commenters contend that any guidelines the Commission might issue would be useless, because generalized national guidelines could not take into account the variations among states and among individual LECs.[3065] For example, the Minnesota Independent Coalition argues that the additional grant of authority to states under section 214(e) confirms that state commissions have the sole authority to make determinations under section 251(f).[3066] A number of small telephone companies and associations of LECs advocate mandatory national rules regarding implementation of section 251(f). They assert that such rules would ensure that states carry out this provision in accordance with congressional

[3062] 47 U.S.C. § 251(f)(2).

[3063] *See, e.g.*, Alaska Commission comments at 6; Alabama Commission comments at 33-34; California Commission comments at 46; Idaho Commission comments at 14; Illinois Commission comments at 84; Louisiana Commission comments at 22-23; Ohio Commission comments at 80; Oregon Commission comments at 31; Pennsylvania Commission comments at 42; Texas Commission comments at 34; Wyoming Commission comments at 38-39.

[3064] Ad Hoc Telecommunications Users Committee comments at 11; ALLTEL comments at 16; Citizens Utilities comments at 34; Colorado Ind. Tel. Ass'n comments at 5-6; GVNW comments at 42; GTE comments at 80; Home Tel. comments at 1; Illinois Ind. Tel. Ass'n comments at 7; Minnesota Ind. Coalition comments at 14; Ohio Consumers' Counsel reply at 25-26; PacTel comments at 99; Puerto Rico Tel. reply at 16-17; Rural Tel. Coalition comments at 11-15.

[3065] Minnesota Ind. Coalition comments at 14; Western Alliance comments at 7.

[3066] Minnesota Ind. Coalition comments at 14.

XII. EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS OF SECTION 251 REQUIREMENTS

A. BACKGROUND

1249. Section 251(f)(1) grants rural telephone companies an exemption from section 251(c), until the rural telephone company has received a bona fide request for interconnection, services, or network elements, and the state commission determines that the exemption should be terminated.[3060] Section 251(f)(2) allows LECs with fewer than two percent of the nation's subscriber lines to petition a state commission for a suspension or modification of any requirements of sections 251(b) and (c). Section 251(f) imposes a duty on state commissions to make determinations under this section, and establishes the criteria and procedures for the state commissions to follow. In the NPRM, we tentatively concluded that state commissions have the sole authority to make determinations under section 251(f). In addition, we sought comment on whether we should issue guidelines to assist state commissions when they make determinations regarding exemptions, suspensions, or modifications under section 251(f).

1250. Although subsections (f)(1) and (f)(2) both address the circumstances under which an incumbent LEC could be relieved of duties otherwise imposed by section 251, subsection 251(f)(2) also applies to non-incumbent LECs. The standard for determining whether to exempt a carrier under subsection 251(f)(1) is different from the standard for determining whether to grant a suspension or modification under subsection (f)(2). Subsection 251(f)(1)(B) requires state commissions to determine that terminating a rural exemption is consistent with the universal service provisions of the 1996 Act.[3061] Subsection 251(f)(2)(A)(i) requires state commissions to grant a suspension or modification if it is necessary to "avoid a significant adverse economic impact on users of telecommunications services generally," and subsection 251(f)(2)(B) requires a suspension or modification to be

[3060] A rural telephone company is defined as a local exchange carrier operating entity to the extent that such entity "(A) provides common carrier service to any local exchange carrier study area that does not include either-- (i) any incorporated place of 10,000 inhabitants or more, or any part thereof . . .; or (ii) any territory, incorporated or unincorporated, included in an urbanized area . . .; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 153(37).

[3061] The provision states, "the State commission shall terminate the exemption if the request . . . is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)." 47 U.S.C. § 251(f)(1)(B).

253(b), explicitly permit states to impose additional obligations. Such additional obligations, however, must be consistent with the language and purposes of the 1996 Act.

1248. Section 251(h)(2) sets forth a process by which the FCC may decide to treat LECs as incumbent LECs. Thus, when the conditions set forth in section 251(h)(2) are met, the 1996 Act contemplates that new entrants will be subject to the same obligations imposed on incumbents. While we find that states may not unilaterally impose on non-incumbent LECs obligations the 1996 Act expressly imposes only on incumbent LECs, we find that state commissions or other interested parties could ask the FCC to classify a carrier as an incumbent LEC pursuant to section 251(h)(2). At this time, we decline to adopt specific procedures or standards for determining whether a LEC should be treated as an incumbent LEC. Instead, we will permit interested parties to ask the FCC to issue an order declaring a particular LEC or a class or category of LECs to be treated as incumbent LECs. We expect to give particular consideration to filings from state commissions. We further anticipate that we will not impose incumbent LEC obligations on non-incumbent LECs absent a clear and convincing showing that the LEC occupies a position in the telephone exchange market comparable to the position held by an incumbent LEC, has substantially replaced an incumbent LEC, and that such treatment would serve the public interest, convenience, and necessity and the purposes of section 251.[3059]

[3059] 47 U.S.C. § 251(h)(2).

1996 Act specifically imposes different, and additional obligations on incumbent carriers.[3052] In addition, these parties contend that imposing the same regulatory obligations on non-incumbents is unnecessary because they lack market power,[3053] and is contrary to Congress's desire to facilitate new entry into the local telephone market.[3054] In addition, they assert that section 251(h)(2), which gives the FCC authority to determine when to treat additional carriers as incumbent LECs, would be meaningless if states could decide on their own to subject any LEC to obligations imposed by section 251(c) on incumbent LECs.[3055] Some parties assert that states already impose reciprocal obligations on new entrants, or require them to comply with requirements the 1996 Act only imposes on incumbent LECs.[3056]

3. Discussion

1247. We conclude that allowing states to impose on non-incumbent LECs obligations that the 1996 Act designates as "Additional Obligations on Incumbent Local Exchange Carriers," distinct from obligations on all LECs,[3057] would be inconsistent with the statute.[3058] Some parties assert that certain provisions of the 1996 Act, such as sections 252(e)(3) and

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[3052] *See, e.g.*, ACTA comments at 5; Comcast comments at 17; Sprint comments at 10; Cox reply at 41; ICTA reply at 5.

[3053] *See, e.g.*, Comcast comments at 15-16; DoJ comments at 7 (absent a showing of market power, there is no basis for imposing additional obligations on new entrants); MCI comments at 5 n.7; Cox reply at 40; Time Warner reply at 11.

[3054] *See, e.g.*, Continental comments at 18; Metricom comments at 2 (imposing such requirements on non-dominant carriers would hinder competition); NEXTLINK comments at 15-16 (for states to impose additional obligations on non-incumbent LECs could constitute a barrier to entry in violation of section 253); Cox reply at 41; ICTA reply at 6 (imposing 251(c) requirements on new entrants would raise costs and thereby discourage potential competitors from entering the local market).

[3055] *See, e.g.*, GST comments at 3-4; MFS comments at 10; Time Warner comments at 15 (fact that Congress authorizes the FCC (but not state commissions) to impose incumbent obligations on the FCC suggests that Congress did not intend to give states that authority); TCI reply at 12; Teleport reply at 36.

[3056] TCI comments at 14 n.23; *see also* Colorado Commission comments at 11-12 (stating that it exempts new entrants from certain rules for a period of three years, after which the new entrant must demonstrate the continued need for such exemption); Illinois Commission comments at 19 (stating that it imposes intraLATA presubscription and line-side interconnection obligations on new entrants for policy reasons).

[3057] *Compare* 47 U.S.C. §§ 251(b) and 251(c).

[3058] We understand that some states may be imposing on non-incumbent LECs obligations set forth in section 251(c). *See, e.g.*, Colorado Commission comments at 11-12; Draft Decision, State of Connecticut Department of Public Utility Control, Docket No. 94-10-04 at 60, 65 (Connecticut Commission July 11, 1996); Illinois Commission comments at 19. We believe that these actions may be inconsistent with the 1996 Act.

deemed to be incumbent LECs under section 251(h) may be required to comply with any or all of the obligations that apply to incumbent LECs, and whether states may impose on non-incumbent LECs the obligations that are imposed on incumbent LECs under section 251(c).[3045]

2. **Comments**

1244. Most parties that commented on the issue contend that the Commission should not establish in this proceeding standards and procedures for determining whether a LEC should be treated as an incumbent LEC.[3046]

1245. Many incumbent LECs and state commissions contend that it is not inconsistent with the Act for states to impose the requirements in section 251(c) on carriers that do not fall within the 1996 Act's definition of incumbent. These parties note that sections 251(d)(3), 252(e)(3), and 253(b) permit states to impose additional requirements on carriers.[3047] State commissions allege that they are in the best position to determine when it is appropriate to impose particular obligations on new entrants.[3048] These parties contend that state imposition of reciprocal obligations would be equitable,[3049] and would help promote fair negotiation and realistic demands by the new entrants.[3050]

1246. Potential local competitors argue that states may not impose any of the requirements of section 251(c) on non-incumbent LECs.[3051] These parties contend that the

[3045] NPRM at paras. 44-45.

[3046] BellSouth comments at 10; NCTA comments at 15 n.46; Sprint comments at 10; Time Warner comments at 14; *contra* PacTel comments at 16.

[3047] *See, e.g.*, BellSouth comments at 10; California Commission comments at 12; Illinois Commission comments at 19-20 (it is not inconsistent with the Act for states to impose additional obligations on non-incumbents, although it would not be permissible for FCC to do so); Ohio Commission comments at 21-22; PacTel comments at 16; Pennsylvania Commission comments at 19.

[3048] *See, e.g.*, District of Columbia Commission comments at 14.

[3049] *See, e.g.*, Colorado Commission comments at 14-15; MECA comments at 18; Municipal Utilities comments at 10-12 (reciprocal obligations should be permitted as long as they are allowed under state law and city charter); Ohio Consumers' Counsel comments at 5-6 (the loop is a bottleneck regardless of whether the provider is an incumbent or a new entrant); Ohio Commission reply at 8.

[3050] *See, e.g.*, MCI comments at 16, 20; New Jersey Commission at 1.

[3051] *See, e.g.*, MCI comments at 5 n.7; MFS comments at 10; TCI comments at 14.

of access). Therefore, upon the filing of an access complaint with the Commission, the defending party or the state itself should come forward to apprise us whether the state is regulating such matters.[3042] If so, we shall dismiss the complaint without prejudice to it being brought in the appropriate state forum. A party seeking to show that a state regulates access issues should cite to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. Especially probative will be a requirement that the relevant state authority resolve an access complaint within a set period of time following the filing of the complaint.[3043]

C. IMPOSING ADDITIONAL OBLIGATIONS ON LECS

1. Background

1241. Section 251(c) imposes obligations on incumbent LECs in addition to the obligations set forth in sections 251(a) and (b). It establishes obligations of incumbent LECs regarding: (1) good faith negotiation; (2) interconnection; (3) unbundling network elements; (4) resale; (5) providing notice of network changes; and (6) collocation.

1242. Section 251(h)(1) defines an incumbent LEC as a LEC within a particular service area that: (1) as of the enactment of the 1996 Act, provided telephone exchange service in such area; and (2) as of the enactment of the 1996 Act, was deemed to be a member of the exchange carrier association pursuant to 47 C.F.R. § 69.601(b) or, on or after the enactment of the 1996 Act, became a successor or assign of such carrier. Section 252(h)(2) provides that, "[t]he Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section."[3044]

1243. In the NPRM, we sought comment on whether we should establish at this time standards and procedures by which interested parties could prove that a particular LEC should be treated as an incumbent LEC. We also sought comment on whether carriers that are not

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[3042] Our rules require service of a pole attachment complaint on both the defending utility and the state. 47 C.F.R. § 1.1404(b).

[3043] *See* 47 U.S.C. § 224(c)(3) (establishing deadlines for states to take final action on complaints concerning the rates, terms, or conditions of access).

[3044] 47 U.S.C. § 252(h)(2).

under section 224(f)(1). These circumstances include when a cable system or telecommunications carrier seeks access to the facilities or rights-of-way of a non-LEC utility. In such cases, the expansion of the Commission's authority to require utilities to provide nondiscriminatory access under section 224(f) is countered by a corresponding expansion in the scope of a state's authority under section 224(c)(1) to preempt federal requirements. The authority of a state under section 224(c)(1) to preempt federal regulation in these cases is clear.[3040]

1237. The issue becomes more complicated when a telecommunications carrier seeks access to LEC facilities or property under section 251(b)(4). By its express terms, section 251(b)(4) imposes upon LECs, "[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such a carrier to competing providers of telecommunications services on rates, terms and conditions that are consistent with section 224."[3041] We believe the reference in section 251(b)(4) to section 224 incorporates all aspects of the latter section, including the state preemption authority of section 224(c)(1). This interpretation is consistent not only with the plain meaning of the statute but with the overall application of sections 251 and 252.

1238. In the 1996 Act, Congress expanded section 224(c)(1) to reach access issues. Congress' clear grant of authority to the states to preempt federal regulation in these cases undercuts the suggestion that Congress sought to establish federal access regulations of universal applicability. Moreover, we do not find it significant that the access provisions of sections 251 and 271 contain no specific reference to the preemptive authority of states under section 224(c)(1), since both provisions expressly refer to section 224 generally.

1239. Thus, when a state has exercised its preemptive authority under section 224(c)(1), a LEC satisfies its duty under section 251(b)(4) to afford access by complying with the state's regulations. If a state has not exercised such preemptive authority, the LEC must comply with the federal rules. Similarly, when a telecommunications carrier seeks access rights from an incumbent LEC by choosing to avail itself of the negotiation and arbitration procedures established in section 252, a state that has exercised its preemption rights will apply its own set of regulations in the arbitration process pursuant to section 252 (c)(1). Finally, we note that state regulation in this area is subject to the provisions of section 253.

1240. We note that Congress did not amend sections 224(c)(2) to prescribe a certification procedure with respect to access (as distinct from the rates, terms, and conditions

[3040] As in other circumstances, and subject to certain limitations, the Commission may preempt an otherwise valid state or local access requirement that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service." 47 U.S.C. § 253(a).

[3041] 47 U.S.C. § 254(b)(1)(4).

for state regulation of access.[3031] Cole argues that neither section 251 nor section 271 exempts a LEC or BOC from the access requirements of section 224 where the state has undertaken regulation of such matters. Cole argues that allowing states to preempt federal authority "would defeat the purpose of the Act to promote access" to local facilities.[3032]

1234. Similarly, Nextlink contends that the Commission's access requirements should apply to any LEC that receives an access request under section 251(b)(4), regardless of whether a state has attempted to assert jurisdiction under section 224(c).[3033] Nextlink describes section 251 as "an entirely separate section providing entirely different bases for Commission jurisdiction."[3034]

1235. Other commenters argue that a request for access under section 251(b)(4) always implicates section 224, including the provisions of section 224(c)(1) that allow the states to preempt federal regulation.[3035] The District of Columbia Commission argues that section 251(b)(4) only requires that access be given "'on rates, terms and conditions that are consistent with section 224.'"[3036] Thus, this commenter asserts that any federal regulation of access under section 251(b)(4) is subject to the state's authority under section 224(c)(1).[3037] Bell Atlantic agrees, arguing that the only obligation of section 251(b)(4) is to provide access consistent with section 224 and that providing access in accordance with a valid scheme of state access regulations meets this requirement, regardless of any federal access requirements that otherwise would apply.[3038] UTC states that "the statute clearly gives the states authority to establish access requirements if they elect to assert jurisdiction."[3039]

c. **Discussion**

1236. To resolve this issue, we will begin with access requests that can arise solely

[3031] 47 U.S.C. § 271(c)(2)(b)(iii); *see* Cole comments at 27.

[3032] Cole reply at 27.

[3033] Nextlink reply at 5.

[3034] *Id.*

[3035] Ameritech comments at 33; NYNEX comments at 11-12; USTA reply at 7.

[3036] District of Columbia Commission comments at 9, *quoting* 47 U.S.C. § 251(b)(4).

[3037] *Id.*

[3038] Bell Atlantic comments at 12.

[3039] UTC reply at 29.

6. Reverse preemption

a. Background

1232. Even prior to enactment of the 1996 Act, section 224(b)(1) gave the Commission jurisdiction to "regulate the rates, terms, and conditions for pole attachments . . . ."[3026] Under former section 224(c)(1), that jurisdiction was preempted where a state regulated such matters. Such reverse preemption was conditioned upon the state following a certification procedure and meeting certain compliance requirements set forth in sections 224(c)(2) and (3). The 1996 Act expanded the Commission's jurisdiction to include not just rates, terms, and conditions, but also the authority to regulate non-discriminatory access to poles, ducts, conduits and rights-of-way under section 224(f).[3027] At the same time, the 1996 Act expanded the preemptive authority of states to match the expanded scope of the Commission's jurisdiction. section 224(c)(1) now provides:

> Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by the State.[3028]

b. Comments

1233. Cole contends that the nondiscriminatory access provisions of section 224 and our jurisdiction thereunder survive when a telecommunications provider seeks access to the facilities or property of a LEC under section 251(b)(4), even where such matters are regulated by a state.[3029] Cole notes that section 251(b)(4) requires LECs to afford access to its facilities and rights-of-way to competing telecommunications carriers "on rates, terms, and conditions that are consistent with section 224," with no reference to the possibility of state regulation.[3030] Cole further cites the competitive checklist of section 271 which requires an RBOC to provide such access "in accordance with the requirements of section 224," but which does not provide

[3026] 47 U.S.C. § 224(b)(1).

[3027] 47 U.S.C. § 224(f).

[3028] 47 U.S.C. § 224(c)(1).

[3029] Cole reply at 26-27.

[3030] 47 U.S.C. § 251(b)(4); *see* Cole comments at 26-27.

dispute, the state commission must ensure, among other things, that the ultimate resolution "meet[s] the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251 . . . . ."[3023] The Commission may assume the state's authority under section 252 if the state "fails to carry out its responsibility" under that section.[3024]

1229. Section 251(c)(1) creates an obligation on the part of an incumbent LEC "to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements . . . " to fulfill its section 251(b)(4) obligation.[3025] Therefore, a telecommunications carrier may seek access to the facilities or property of an incumbent LEC pursuant to section 251(b)(4) and trigger the negotiation and arbitration procedures of section 252. If a telecommunications carrier intends to invoke the section 252 procedures, it should affirmatively state such intent in its formal request for access to the incumbent LEC. We impose this requirement because the two procedures have separate deadlines by which the parties may or must take certain steps, and therefore the incumbent LEC receiving the request has a need to know which procedure has been invoked. Section 224 shall be the default procedure that will apply if the telecommunications carrier fails to make an affirmative election.

1230. We note that section 252 does not impose any obligations on utilities other than incumbent LECs, and does not grant rights to entities that are not telecommunications providers. Therefore, section 252 may be invoked in lieu of section 224 only by a telecommunications carrier and only if it is seeking access to the facilities or property of an incumbent LEC.

1231. In addition, incumbent LECs cannot use section 251(b)(4) as a means of gaining access to the facilities or property of a LEC. A LEC's obligation under section 251(b)(4) is to afford access "on rates, terms, and conditions that are consistent with section 224." Section 224 does not prescribe rates, terms, or conditions governing access by an incumbent LEC to the facilities or rights-of-way of a competing LEC. Indeed, section 224 does not provide access rights to incumbent LECs. We cannot infer that section 251(b)(4) restores to an incumbent LEC access rights expressly withheld by section 224. We give deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4). Accordingly, no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4).

[3023] 47 U.S.C. § 252(c)(1).

[3024] 47 U.S.C. § 252(e)(5).

[3025] 47 U.S.C. § 251(c)(1).

of the Commission's rules.[3018] Final decisions relating to access will be resolved by the Commission expeditiously.[3019] Because we are using the expedited process described herein, we do not believe stays or other equitable relief will be granted in the absence of a specific showing, beyond the prima facie case, that such relief is warranted.

(2) Procedures Under Section 251

1226. A telecommunications carrier seeking access to the facilities or property of a LEC may invoke section 251(b)(4) in lieu of, or in addition to, section 244(f)(1). Because section 251(b)(4) mandates access "on rates terms, and conditions that are consistent with section 224," we believe that the section 224 complaint procedures established above should be available regardless of whether a telecommunications provider invokes section 224(f)(1) or section 251(b)(4), or both.

1227. If a telecommunications carrier seeks access to the facilities or property of an incumbent LEC, however, it shall have the option of invoking the procedures established by section 252 in lieu of filing a complaint under section 224. Section 252 governs procedures for the negotiation, arbitration, and approval of certain agreements between incumbent LECs and telecommunications carriers.[3020] In pertinent part, section 252(a)(1) provides:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) or (c) of section 251.[3021]

1228. Where parties are unable to reach an agreement under this section, any party may petition the relevant state commission to arbitrate the open issues.[3022] In resolving the

[3018] 47 C.F.R. § 1.1404(b).

[3019] We note, however, that if the Commission requests additional information from any party, such party will have 5 days to respond to the request. Failure to provide the requested information within the 5 days, will result in a review of the record provided thus far.

[3020] 47 U.S.C. § 252. The requirements of section 252, and the conditions set forth in this section 3(a) of this Order, do not apply if the party seeking access is not a telecommunications carrier, or if the party receiving the request for access is not an incumbent LEC.

[3021] 47 U.S.C. § 251(a).

[3022] 47 U.S.C. § 252(b)(1).

Thus, we expect a utility that receives a legitimate inquiry regarding access to its facilities or property to make its maps, plats, and other relevant data available for inspection and copying by the requesting party, subject to reasonable conditions to protect proprietary information.[3012] This provision eliminates the need for costly discovery in pursuing a claim of improper denial of access, allowing attaching parties, including small entities with limited resources, to seek redress of such denials.[3013]

1224. We agree with the Joint Cable Commenters that "time is of the essence."[3014] The Joint Cable Commenters contend that the Commission should implement an expedited review process for denial of access cases.[3015] By implementing specific complaint procedures for denial of access cases, we seek to establish swift and specific enforcement procedures that will allow for competition where access can be provided.[3016] In order to provide a complete record, written requests for access must be provided to the utility. If access is not granted within 45 days of the request, the utility must confirm the denial in writing by the 45th day. Although these written requirements involve some recordkeeping obligations, which could impose a burden on small incumbent LECs and small entities, we believe that burden is outweighed by the benefits of certainty and expedient resolution of disputes which this procedure encourages.[3017] The denial must be specific, and include all relevant evidence or information supporting its denial. It must enumerate how the evidence relates to one of the reasons that access can be denied under section 224(f)(2), *i.e.,* lack of capacity, safety, reliability or engineering standards.

1225. For example, a utility may attempt to deny access because of lack of capacity on a 40-foot pole. We would expect a utility to provide the information demonstrating why there is no capacity. In addition, the utility should show why it declined to replace the pole with a 45-foot pole. Upon the receipt of a denial notice from the utility, the requesting party shall have 60 days to file its complaint with the Commission. We anticipate that by following this procedure the Commission will, upon receipt of a complaint, have all relevant information upon which to make its decision. The petition must be served pursuant to section 1.1404(b)

[3012] AT&T comments at 19; GST comments at 6.

[3013] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601, et seq.

[3014] Joint Cable Commenters reply at 24.

[3015] Joint Cable Commenters reply at 25.

[3016] Joint Cable Commenters reply at 24.

[3017] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

applicable engineering purposes."[3003] We have determined that other utilities also may consider these concerns when faced with an access request.[3004] A denial of access, while proper in some cases, is an exception to the general mandate of section 224(f). We note that utilities contend that they are in the best position to determine when access should be denied, because they possess the information and expertise to make such decisions and because of the varied circumstances impacting these decisions.[3005] We think it appropriate that the utility bear the burden of justifying why its denial of access to a cable television or telecommunications carrier fits within that exception.[3006] We therefore agree that utilities have the ultimate burden of proof in denial-of-access cases.[3007] We believe this will minimize uncertainty and reduce litigation and transaction costs, because new entrants generally, and small entities in particular, are unlikely to have access to the relevant information without cooperation from the utilities.[3008]

1223. We also agree with Virginia Power that a telecommunications carrier or cable television provider filing a complaint with the Commission must establish a prima facie case.[3009] A petitioner's complaint, in addition to showing that it is timely filed, must state the grounds given for the denial of access, the reasons those grounds are unjust or unreasonable, and the remedy sought. The complaint must be supported by the written request for access, the utility's response, and information supporting its position.[3010] The Commission will deny the petitioner's claim if a prima facie case is not established.[3011] A complaint will not be dismissed if a petitioner is unable to obtain a utility's written response, or if a petitioner is denied any other relevant information by the utility needed to establish a prima facie case.

[3003] *See* 47 U.S.C. § 224(f)(2).

[3004] *See supra*, Section B(1)(c)(2).

[3005] *See generally* Comments of American Electric Power; Delmarva Power and Light; NEES; Puget Sound; Public Service Company of New Mexico; UTC; Virginia Power.

[3006] Public Service Company of New Mexico at 20-23; Delmarva Power and Light at 19; Joint Cable commenters at 18; WinStar reply at 7; Sprint reply at 20.

[3007] Comments of Public Service Company of New Mexico at 20-23; Ohio Consumers' Counsel reply at 6; PUCO Staff comments at 12.

[3008] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[3009] Virginia Power comments at 14; American Electric Power comments at 40-42; Carolina Power and Light comments at 5 (*citing* 47 C.F.R. § 1.1409(b)); *see also* SBC comments at 15-17.

[3010] Virginia Power comments at 15 (*citing* 47 C.F.R. § 1.1404(f) and (g)).

[3011] 47 C.F.R. § 1.1409(d).

cases, and that no principled basis exists for altering historic procedures.[2997] In addition, commenters expressed concern that placing the burden of proof on a utility unfairly presumes bad faith.[2998]

1220. PECO agrees with some cable commenters that the reasonableness of a denial of access should be based on industry safety and operational standards. A restriction on access imposed in accordance with such standards should be irrebuttably presumed reasonable, according to PECO. If the utility seeks to impose stricter standards, the burden would be on the utility to establish the reasonableness of the stricter standard. Predicting the likelihood of fact-intense disputes on such issues, PECO recommends the adoption of adequate dispute-resolution procedures.[2999] Similarly, Cole contends that a utility cannot deny a request for access based upon safety or reliability concerns as long as the applicant is willing to undertake the obligations necessary to comply with NESC standards.[3000] Safety and reliability standards that exceed NESC standards should be presumed unreasonable if they are used to deny access to a pole. The utility would then have the burden of showing the reasonableness of such standards.[3001]

1221. Duquesne argues that it is appropriate for the utility to bear the burden of establishing a threat to reliability if that rationale is used to deny access. Once a utility makes a showing, based on an engineering analysis, that the attachments "quantifiably threaten reliability," the burden would shift to the party seeking the attachment to show that the utility's analysis is incomplete or invalid, with the utility holding the ultimate burden of proof.[3002]

c. Discussion

(1) General Complaint Procedures Under Section 224

1222. Section 224(f)(2) provides that an electric utility may deny non-discriminatory access "where there is insufficient capacity and for reasons of safety, reliability and generally

[2997] ConEd comments at 12; American Electric Power reply at 32-36; BellSouth reply at 16-17; SBC reply at 26-27.

[2998] GTE reply at 26-27; NEES comments at 14.

[2999] PECO comments at 6.

[3000] Cole comments at 16.

[3001] *Id.*, at 17-18.

[3002] Duquesne comments at 22; *accord* Delmarva Comments at 19.

modification costs by the amount of future revenues emanating from the modification expands the category of responsible parties based on factors that Congress did not identify as relevant. Since Congress did not provide for an offset, we will not impose it ourselves. Indeed, a requirement that utilities pass additional attachment fees back to parties with preexisting attachments may be a disincentive to add new competitors to modified facilities, in direct contravention of the general intent of Congress.

5. Dispute Resolution

a. Background

1217. Implementation of the access requirements of sections 224 and 251(b)(4) require the adoption of enforcement procedures. In the NPRM, we sought comment on, among other things, whether to impose upon a utility the burden of justifying its denial of access to its poles, ducts, conduits, and rights-of-way due to lack of capacity, safety, reliability, and engineering issues.[2992]

b. Comments

1218. With respect to dispute resolution procedures generally, a few commenters note that existing complaint procedure mechanisms have worked well in the cable television pole context and should be adequate in this broader context as well.[2993] Other commenters argue that dispute resolution should be left to the states, with federal intervention only where the states failed to regulate.[2994] Some commenters request that any complaint mechanism established should provide for the expeditious resolution of disputes, with short time frames for responses and final resolution.[2995]

1219. Several commenters argue that, where access has been denied, the party denying access should have the burden of proving that such denial was justified.[2996] Others contend that, historically, cable operators have had the burden of proof in pole attachment

[2992] NPRM at para. 223; *see* 47 U.S.C. § 224(f)(2).

[2993] *See, e.g.*, BellSouth reply at 16-17; GTE reply at 29-30; U S West reply at 8.

[2994] ICC comments at 72-73; Bell Atlantic reply at 10-11; GTE reply at 29-30; PacTel reply at 27.

[2995] *See, e.g.*, Joint Cable commenters at 20-22; NEXTLINK comments at 6-7.

[2996] Delmarva comments at 19; Duquesne comments at 22; Joint Cable commenters at 20-22; NEXTLINK comments at 6-7; OCC reply at 6; PUCO Staff comments at 11-12; Sprint reply at 20.

attachments to the modified facility after the modification is completed to avoid any obligation to share in the cost. If this occurs, the entity initiating and paying for the modification might pay the entire cost of expanding a facility's capacity only to see a new competitor take advantage of the additional capacity without sharing in the cost.[2986] Moreover, entities with preexisting attachments may, due to cost considerations, forgo the opportunity to adjust their attachment only to see a new entrant attach to a pole without sharing the modification cost. To protect the initiators of modifications from absorbing costs that should be shared by others, we will allow the modifying party or parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. The proportionate share of the subsequent attacher should be reduced to take account of depreciation to the pole or other facility that has occurred since the modification. These provisions are intended to ensure that new entrants, especially small entities with limited resources, bear only their proportionate costs and are not forced to subsidize their later-entering competitors. To the extent small entities avail themselves of this cost-saving mechanism, however, they will incur certain record keeping obligations.[2987]

1215. Parties requesting or joining in a modification also will be responsible for resulting costs to maintain the facility on an ongoing basis. We believe determining the method by which to allocate such costs can best be resolved in the context of a proceeding addressing the determination of appropriate rates for pole attachments or other facility uses.[2988] We will postpone consideration of these issues until such time.

1216. We recognize that in some cases a facility modification will create excess capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification.[2989] We do not believe that this requires the owner to use those revenues to compensate the parties that did pay for the modification. Section 224(h) limits responsibility for modification costs to any party that "adds to or modifies its existing attachment after receiving notice" of a proposed modification.[2990] The statute does not give that party any interest in the pole or conduit other than access. Creating a right for that party to share in future revenues from the modification would be tantamount to bestowing an interest that the statute withholds.[2991] Requiring an owner to offset

2986 *See* AT&T comments at 19.

2987 *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

2988 BellSouth comments at 18; NYNEX comments at 14; SBC comments at 18.

2989 AT&T comments at 21; GST Telecom comments at 9; WinStar reply at 8-9.

2990 47 U.S.C. § 224(h).

2991 American Electric Power reply at 46.